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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

JEFFREY KAIN, Individually and on Behalf
of All Others Similarly Situated,

Plaintiff,

v.

ACM RESEARCH, INC., DAVID HUI
WANG, LISA FENG, and MARK A.
MCKECHNIE,

Defendants.

Case No.: 3:20-CV-09241-VC

**DEFENDANTS' NOTICE OF MOTION
AND MOTION TO DISMISS**

Date: July 8, 2021
Time: 2:00 p.m.
Location: Courtroom 4 - 17th Floor
Judge: Hon. Vince Chhabria

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that at the time and place noted above, Defendants will and hereby do move to dismiss Plaintiff's Amended Complaint pursuant to Federal Rules of Civil Procedure 12(b)(6), 8(a) and 9(b).

STATEMENT OF ISSUES

Does Plaintiff state a claim under §§ 10(b) or 20(a) of the Securities Exchange Act of 1934?

EXECUTIVE SUMMARY

The Amended Complaint fails to plead the particularized facts required to allege securities fraud. Instead, Plaintiff relies solely on unsubstantiated short-seller allegations. Courts have repeatedly rejected such short-seller attacks as the basis for securities lawsuits because short sellers are interested in manipulating the stock price of their targets for their own benefit. Plaintiff's exclusive reliance on short-seller allegations means that he fails to plead the key elements of his claim: falsity, scienter, and loss causation.

- **No Scienter.** Plaintiff attempts to allege fraud without any facts showing fraudulent intent. Plaintiff's only scienter allegation in the *entire* Amended Complaint is a generic assertion that unnamed defendants must have been aware of the supposed "true facts" because they were high-level executives. Courts repeatedly reject such bare, conclusory statements. Indeed, defendants in these cases are always senior executives.
- **No Falsity.** Plaintiff's sole reliance on a short-seller's attacks leaves him unable to plead the required "particularized facts." In this district alone, Judges Seeborg, Orrick, and Gilliam have dismissed securities fraud complaints based on short sellers. Plaintiff's challenge to ACMR's statements is based on supposition, not facts. The information that Plaintiff claims was omitted was publicly disclosed in ACMR's own SEC filings.
- **No Loss Causation.** Ironically for a "stock drop" lawsuit, Plaintiff cannot point to a statistically significant decline in ACMR's stock price. Nor can Plaintiff meet the well-established requirement that the alleged decline in ACMR's stock price be caused by corrective disclosures. The Ninth Circuit recently reiterated this requirement in *Irving Firemen's Relief & Ret. Fund v. Uber Techs.*, 2021 U.S. App. LEXIS 14892, at *11 (9th Cir.

May 19, 2021). The fluctuations in ACMR's stock price were small, well within the day-to-day volatility of ACMR's stock price. The stock bounced back within days.

Despite Plaintiff having filed this lawsuit six months ago and already amended once, the Amended Complaint is devoid of any particularized facts. Rule 9(b) is designed to "prohibit plaintiffs from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis." *Uber*, 2021 U.S. App. LEXIS 14892, at *13. The Court should dismiss the Amended Complaint with prejudice.

BACKGROUND

A. ACMR's Growing High-Tech Business

ACMR was founded in 1998 in Silicon Valley and supplies advanced technologies for the semiconductor industry. Ex. A at 4, 76. ACMR has been granted more than 350 patents in the United States, China, Japan, Singapore, South Korea, and Taiwan. *Id.* at 5. Currently, the Company's largest source of revenue is its single-wafer wet cleaning equipment, which computer chip manufacturers use to improve their processes and product yields. *Id.*

Beginning in 2006, ACMR formed subsidiaries in China and South Korea to manage its growing overseas operations. Ex. A at 76-77. ACMR went public in the United States on November 3, 2017. *Id.* at 77. Since the IPO, ACMR's business has been successful. Revenue grew from \$74.6 million in 2018 to \$107.5 million in 2019 to \$156.6 million in 2020. *Id.* at 73.

B. ACMR Is Attacked Twice by a Short Seller

ACMR was subjected to heightened levels of short-seller activity in 2020, which made its stock price more volatile. ¶ 145.¹ In fall 2020, ACMR's stock price continued to fluctuate day-to-day, such as when it experienced both a drop and a rise of over 8% on consecutive days. *See* Ex. B at 3 (decrease of 8.93% on November 10, 2020 and rise of 8.35% on November 11, 2020).

On October 8, 2020, one such short seller, J Capital, posted online a so-called "report" criticizing ACMR's business. Ex. C. Like most short sellers, J Capital admitted that it may profit if it managed to drive down ACMR's stock price. In its report, J Capital noted that it "may benefit from

¹ All references to "¶" are to the Amended Complaint for Violations of the Federal Securities Laws (ECF 49), filed on May 6, 2021.

1 short positions . . . and therefore stands to realize significant gains[.]” *Id.* at 1.²

2 J Capital’s report mischaracterized information from ACMR’s U.S. public filings, as well as
3 information that ACMR’s Chinese subsidiary had provided to regulators in China. J Capital
4 disclaimed any responsibility for the accuracy of its accusations. Ex. C at 1 (“J Capital Research
5 USA LLC makes no representation, express or implied, as to the accuracy, timeliness, or
6 completeness of any such information”). Its report was replete with caveats, such as “we believe,”
7 “we estimate,” and “we think.” *Id.* at 1, 3-4, 10, 12-13, 15-16, 21-24, 29-30, 33, 38, 41-42.

8 Mainstream market analysts strongly disagreed with J Capital’s opinion of ACMR. *E.g.*, Exs.
9 D & E. For example, one analyst concluded that “JCAP’s report could potentially mislead investors.”
10 Ex. D at 1. Another warned that “much of [J Capital’s] report was misleading, propaganda-driven,
11 and in some cases, erroneous.” Ex. E at 1. Given J Capital’s credibility deficit, its October 8 “report”
12 was greeted with a yawn: ACMR’s stock price declined only 1.52% to \$70.79. Ex. B at 3. The
13 following day, it rose 6.58%. *Id.*

14 On November 4, 2020, ACMR disclosed its 3Q20 financials. Revenue increased 43% year
15 over year. Ex. F. at Ex. 99.01 at 1. In order to protect its short position, J Capital attacked ACMR’s
16 3Q20 results with another “report” on November 17, 2020. Ex. G. ACMR’s stock had already
17 declined for several days in a row prior to J Capital’s November attack. Ex. B at 3. That decline
18 continued on November 17, when J Capital released its second “report.” *Id.* ACMR’s stock then
19 rebounded within the next two weeks, climbing back above where it had been prior to J Capital’s
20 second attack. *Id.* at 2-3.

21 J Capital’s attacks did not have any lasting impact on ACMR’s stock price. In early January
22 2021, it rose above \$100, before peaking at almost \$140 in mid-February. Ex. B at 2.

23 **C. Plaintiff’s Lawsuit Parrots the Short-Seller Attack**

24 On December 21, 2020, Plaintiff filed this lawsuit, based entirely on the accusations made by
25 J Capital in October 2020. ECF 1. Plaintiff does not allege that he ever owned any ACMR stock.

26
27 ² This was not J Capital’s first short-seller attack: It is being sued for defamation in the U.S. District
28 Court for the Eastern District of New York for an earlier attack against a different company.
Complaint, *NOVAGOLD Resources Inc. v. J Capital Research USA LLC*, Case No.
1:20-cv-02875-LDH-PK (E.D.N.Y. June 29, 2020), ECF 1.

1 He only traded in options contracts for ACMR stock. Plaintiff was making a bet that the price of
 2 ACMR's stock would rise over \$100 by November 20, 2020, which is when the window to exercise
 3 the options would close. ECF 23-3 at 2. On November 3, 2020, as the closing of that window
 4 neared, Plaintiff ended his speculation in ACMR. He sold the options contracts, without having
 5 purchased or sold any ACMR stock. *Id.*

6 Despite having six months during which to flesh out his claims, Plaintiff's Amended
 7 Complaint contains no allegations other than those made by J Capital.

8 ARGUMENT

9 Plaintiff fails to state a claim for Section 10(b) of the Exchange Act because he fails to allege
 10 (1) a fraudulent state of mind ("scienter"); (2) a material misrepresentation or omission; or (3) loss
 11 causation. *See Wochos v. Tesla, Inc.*, 985 F.3d 1180, 1188 (9th Cir. 2021) (elements of 10(b) claim).
 12 Plaintiff must "satisfy the heightened pleading requirements of both Federal Rule of Civil Procedure
 13 9(b) and the [PSLRA]." *Irving Firemen's Relief & Ret. Fund v. Uber Techs., Inc.*, 2018 U.S. Dist.
 14 LEXIS 149393, at *5 (N.D. Cal. Aug. 31, 2018) (Gilliam, J.). Plaintiff's allegations fall short of this
 15 stringent standard.

16 I. PLAINTIFF FAILS TO ALLEGE SCIENTER

17 Plaintiff does not allege the required particularized facts giving rise to a "strong inference"
 18 that any defendant "acted with an intent to deceive, manipulate, or defraud." *Metzler Inv. GMBH v.*
 19 *Corinthian Colls., Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008). To satisfy this element, Plaintiff's
 20 allegations must be "more than merely plausible or reasonable—[they] must be cogent and at least as
 21 compelling as any opposing inference of nonfraudulent intent." *Tellabs, Inc. v. Makor Issues &*
 22 *Rights*, 551 U.S. 308, 314 (2007). Despite this "high bar for pleading scienter," *Graves v. AECOM*,
 23 2017 U.S. Dist. LEXIS 222299, at *29 (C.D. Cal. June 19, 2017), the Amended Complaint contains
 24 only a *single*, conclusory allegation: that the Individual Defendants must have been aware of
 25 purported "true facts" because of their positions at ACMR. ¶ 147. This allegation falls short for
 26 three reasons.

27 ***Cannot Infer Scienter from Defendants' Job Titles.*** The Ninth Circuit has squarely rejected
 28 Plaintiff's only theory of scienter—that Defendants must have been "privy to confidential proprietary

information concerning ACM[R]” because they were Company executives. ¶ 147. “Where a complaint relies on allegations that management had an important role in the company but does not contain additional detailed allegations about the defendants’ actual exposure to information, it will usually fall short of the PSLRA standard.” *Prodanova v. H.C. Wainwright & Co., LLC*, 993 F.3d 1097, 1108 (9th Cir. 2021) (affirming dismissal where “[t]here [was] thus no factual basis for the allegation that [defendant] acted with knowledge or deliberate recklessness”); *see also In re Oak Tech. Sec. Litig.*, 1997 U.S. Dist. LEXIS 18503, at *30-31 (N.D. Cal. Aug. 1, 1997) (Williams, J.) (dismissing complaint; no scienter based on allegation that “because of [individual defendants’] positions” they “were privy to inside information”). In a similar case, Judge Tigar rejected the plaintiff’s attempt to infer scienter from defendants’ roles within the company and their access to internal information. *Curry v. Yelp Inc.*, 2015 U.S. Dist. LEXIS 159001, at *45 (N.D. Cal. Nov. 24, 2015), *aff’d*, 875 F.3d 1219 (9th Cir. 2017). He held that “corporate management’s general awareness of the day-to-day workings of the company’s business does not establish scienter.” *Yelp*, 2015 U.S. Dist. LEXIS 159001, at *46. The same is true here.

No Factual Support. Courts in this district regularly dismiss complaints like Plaintiff’s that contain conclusory scienter allegations. *See, e.g., Rok v. Identiv, Inc.*, 2016 U.S. Dist. LEXIS 105761, at *14 (N.D. Cal. Aug. 10, 2016) (Breyer, J.); *Philco Invs., Ltd. v. Martin*, 2011 U.S. Dist. LEXIS 114314, at *27 (N.D. Cal. Oct. 4, 2011) (Breyer, J.) (“[c]onclusory allegations about a defendant’s state of mind, without specific facts, are not enough”). For example, in *Identiv*, Judge Breyer held that a complaint failed to allege scienter because it “merely plead[ed] conclusory assertions” about defendants’ state of mind. 2016 U.S. Dist. LEXIS 105761, at *10. As in *Identiv*, Plaintiff does not provide a single fact to support his boilerplate allegation of scienter. “In short, there are no allegations regarding what [Defendants] knew at the time any alleged misstatement was made, and no allegations of particularized contemporaneous facts showing that [Defendants] had any information — whether via internal documents, meeting notes, emails, or otherwise — that might cast doubt on any particular statement that [they] allegedly made at that time[.]” *Jackson v. Fischer*, 2015 U.S. Dist. LEXIS 32128, at *51-52 (N.D. Cal. Mar. 13, 2015) (Hamilton, J.) (dismissing complaint).

Group Pleading Disallowed. The Amended Complaint lumps all Defendants together and tries to assign scienter collectively. *See* ¶ 147. Courts in our Circuit hold that such group pleading cannot allege scienter. *See, e.g., Or. Pub. Emples. Ret. Fund v. Apollo Grp. Inc.*, 774 F.3d 598, 607 (9th Cir. 2014) (“we require that the Plaintiffs allege scienter with respect to each of the individual defendants”); *In re Hansen Nat. Corp. Sec. Litig.*, 527 F. Supp. 2d 1142, 1154 (C.D. Cal. 2007) (“the group pleading doctrine can no longer be used in pleading cases under the PSLRA”). The Amended Complaint fails to comply with this basic instruction.

Because Plaintiff fails to plead scienter, the Court may end its analysis here. *See Yelp Inc.*, 875 F.3d at 1222 (affirming dismissal for failure to plead scienter and loss causation; “[w]e need not reach and do not reach Plaintiffs’ arguments regarding materiality and falsity”); *Hessefort v. Super Micro Comput., Inc.*, 2020 U.S. Dist. LEXIS 59505, at *32 (N.D. Cal. Mar. 23, 2020) (Tigar, J.) (“Because scienter is a necessary element of a Section 10(b) claim, Plaintiffs have failed to state such a claim and the Court need not reach Defendants’ argument regarding whether the statements at issue are actionable”); *Wachovia Equity Sec. Litig. v. Wachovia Corp.*, 753 F. Supp. 2d 326, 367 (S.D.N.Y. 2011) (“Because the issue of scienter proves fatal to Plaintiffs’ Section 10(b) claims, the Court need not reach the remaining elements of securities fraud.”).

II. PLAINTIFF FAILS TO ALLEGE A FALSE OR MISLEADING STATEMENT

An alternative basis for dismissal is that Plaintiff cannot satisfy the PSLRA’s “exacting requirements for pleading ‘falsity[.]’” which require “specific facts indicating why those statements were false.” *Corinthian Colls.*, 540 F.3d at 1070. Nor does Plaintiff allege that Defendants “affirmatively create[d] an impression of a state of affairs that differs in a material way from the one that actually exists.” *Brody v. Transitional Hospitals Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002). The Amended Complaint challenges statements about ACMR’s revenues, profits, and other financials. *E.g.*, ¶¶ 40-42, 44-45, 47, 49, 50, 51. It fails for two independent reasons: (A) Plaintiff relies entirely on unreliable, self-interested short-seller attacks; and (B) the Amended Complaint contains no factual allegations that ACMR’s disclosures were inaccurate.

A. Complaint Relies Solely on J Capital’s Short-Seller Attacks

The Amended Complaint recites J Capital’s two “reports” dated October 8, 2020 and

November 17, 2020 as its sole source of allegations. ¶¶ 113-24, 135-42. Courts in this district and elsewhere have repeatedly dismissed securities complaints based on short-seller attacks. *Mulquin v. Nektar Therapeutics*, 2020 U.S. Dist. LEXIS 244841 (N.D. Cal. Dec. 30, 2020) (Gilliam, J.); *In re Intrexon Corp. Sec. Litig.*, 2017 U.S. Dist. LEXIS 26401 (N.D. Cal. Feb. 24, 2017) (Seeborg, J.); *Bonanno v. Cellular Biomedicine Grp., Inc.*, 2016 U.S. Dist. LEXIS 119194 (N.D. Cal. Sep. 2, 2016) (Orrick, J.). The courts recognize that short sellers “operate by speculating that the price of a security will decrease[,]” which means “they have an obvious motive to exaggerate the infirmities of the securities in which they speculate.” *In re Longtop Fin. Techs. Ltd. Sec. Litig.*, 910 F. Supp. 2d 561, 577 (S.D.N.Y. 2012) (dismissing complaint). J Capital admitted as much: “[it] may benefit from short positions . . . and therefore stands to realize significant gains[.]” Ex. C at 1; Ex. G at 1.

As discussed below, J Capital is a particularly fragile source on which to base a securities-fraud complaint. Two courts have recently dismissed securities complaints based on J Capital’s short-seller attacks. *See City of Birmingham Ret. & Relief Sys. v. A.O. Smith Corp.*, 468 F. Supp. 3d 1048, 1058 (E.D. Wis. 2020) (dismissing complaint that “relies on JCap’s speculation”); *Miao v. Fanhua, Inc.*, 442 F. Supp. 3d 774, 803 (S.D.N.Y. 2020) (“allegations contained in the JCap Report [are] insufficiently particular”).³ This Court should do the same for three reasons.

No Independent Investigation. Courts regularly dismiss falsity allegations that rely entirely on short-seller reports without any independent investigation. *See, e.g., Diaz v. N. Dynasty Mins.*, 2018 U.S. Dist. LEXIS 237781, at *17 (C.D. Cal. Apr. 30, 2018) (dismissing complaint; “[t]he basis for each and every allegation of falsity in the FAC is the [short-seller] Report”); *Harris v. AmTrust Fin. Servs.*, 135 F. Supp. 3d 155, 159 (S.D.N.Y. 2015), *aff’d*, 649 Fed. App’x 7 (2d. Cir. 2016) (dismissing complaint “[r]elying almost entirely on a negative report published by a short seller”). Similarly, in *Fanhua*, the court dismissed a complaint that “rel[ie]d entirely on the JCap Report’s summary” because there was “no indication that plaintiff’s counsel here tried to locate or contact a single one of the sources on which they rely[.]” 442 F. Supp. 3d at 804. The same is true here.

³ Another securities lawsuit based on a J Capital report was recently voluntarily dismissed. Notice of Voluntary Dismissal, *In re STAAR Co. Sec. Litig.*, Case No. 8:20-cv-01533-JVS-JDE (C.D. Cal. Jan. 15, 2021), ECF 44.

1 There is “no indication” that Plaintiff did anything more than recycle J Capital’s allegations. *Id.*

2 ***No Support for J Capital’s Credibility.*** Plaintiff’s absolute reliance on J Capital warrants
 3 dismissal where, as here, Plaintiff cannot provide the facts necessary to credit J Capital’s accusations.
 4 For example, in *In re Nektar Therapeutics*, Judge Gilliam held that a short-seller report was “subject
 5 to the same standard applied to evaluate facts alleged to have originated with any ‘confidential
 6 informant’ (or other witness).” 2020 U.S. Dist. LEXIS 122715, at *29 (N.D. Cal. July 13, 2020)
 7 (Gilliam, J.) (dismissing complaint). He found that “[p]laintiffs fail to sufficiently show that the
 8 Report supports their allegations of falsity” because of the short seller’s “disclosures detailing that it
 9 stood to benefit from a poor performance in Nektar’s stock price and the lack of any information
 10 establishing why [short seller’s] opinions on the highly-technical matters at issue here are reliable[.]”
 11 *Id.* Similarly, Plaintiff provides no particularized facts showing that J Capital’s opinions are credible,
 12 rather than self-motivated.

13 The Amended Complaint also fails to provide the Court with the required information about J
 14 Capital’s supposed “source”: an anonymous former employee. ¶¶ 119-129. The Ninth Circuit only
 15 credits allegations from such confidential witnesses if the complaint “provide[s] an adequate basis for
 16 determining that the witnesses in question have personal knowledge of the events they report.”
 17 *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 995 (9th Cir. 2009). The Court should not
 18 credit such allegations because “the confidential sources whose statements comprise the basis of the
 19 [short-seller] Report are not described with any identifying information and do not disclose their own
 20 sources[.]” *Dynasty Mins.*, 2018 U.S. Dist. LEXIS 237781, at *19. The Amended Complaint does
 21 not even claim that the former employee was employed by ACMR *during* the Class Period, so “the
 22 anonymous interviewees’ statements are, aside from the JCap Report’s use of the present tense,
 23 entirely unmoored in time.” *Fanhua*, 442 F. Supp. 3d at 803. Like in *Fanhua*, the Court should
 24 dismiss the Amended Complaint because “[P]laintiff’s counsel in this case appear to have done
 25 nothing whatsoever to confirm the identities or statements of the confidential sources cited in the
 26 JCap Report.” *Id.* at 804.

27 Plaintiff’s failure to provide this information is even more egregious because he misleadingly
 28 quotes J Capital’s own supposed sources. ¶ 119. Although J Capital attributes statements to two

different people, a former employee and a third party (Ex. C at 32), Plaintiff *combines* the two statements and attributes *both* to the supposed former employee. ¶ 119.

J Capital Disclaimed Its Own Allegations. Rather than standing by its accusations against ACMR, J Capital disclaimed them. J Capital’s reports explicitly stated that it “makes no representation, express or implied, as to the *accuracy*, timeliness, or completeness of any such information or with regard to the results to be obtained from its use.” Ex. C at 1; Ex. G. at 1 (emphasis added). The Ninth Circuit has held that similar language in short-seller reports warrants dismissal. *See Grigsby v. Boff Holding, Inc.*, 979 F.3d 1198, 1208 (9th Cir. 2020) (affirming in part dismissal where author of short-seller report “ma[de] no representation as to the accuracy or completeness of the information”); *see also Mulquin v. Nektar Therapeutics*, 2020 U.S. Dist. LEXIS 244841, at *43 (N.D. Cal. Dec. 30, 2020) (Gilliam, J.) (dismissing complaint based on short-seller report that “disclaimed any representation, express or implied, as to the accuracy, timeliness, or completeness of any such information”).

As this Court has recognized, “unsupported opinion . . . cannot substitute for specific factual allegations.” *Mazzaferro v. Aruba Networks Inc.*, 2015 U.S. Dist. LEXIS 15613, at *7 (N.D. Cal. Feb. 2, 2015) (Chhabria, J.), *aff’d sub nom. Par Inv. Partners, L.P. v. Aruba Networks, Inc.*, 681 F. App’x 618 (9th Cir. 2017). J Capital itself admitted that the accusations in its reports represented its *opinion*, not actual facts. *E.g.*, ¶ 120 (“We *think* ACMR management is using five on-paper-only companies to divert money.”) (emphasis added); ¶ 120 (“We *think* that extra payment was diverted”) (emphasis added); ¶ 117 (“We *think* least \$11 mln in warranty and service costs are understated.”) (emphasis added); ¶ 117 (“ACMR *appears* to be strapped for cash”) (emphasis added). Because “[t]he author of the [J Capital reports] discloses that the [reports] represented his or her opinion[,]” they “fail[] to satisfy the PSLRA’s requirements.” *Miller v. PCM, Inc.*, 2018 U.S. Dist. LEXIS 148930, at *29 (C.D. Cal. Jan. 3, 2018) (dismissing complaint based on short-seller’s opinions).

B. No Allegations That ACMR’s Disclosures Were Inaccurate

Aside from J Capital’s accusations, the Amended Complaint lacks any allegations of falsity. Plaintiff copied and pasted snippets from ACMR’s SEC filings, press releases, and earnings calls with random segments bolded and italicized. After each block of text, Plaintiff then repeats a list of

conclusions without any factual basis. *E.g.*, ¶¶ 43, 46, 48, 50, 52, 54. The Ninth Circuit soundly rejects such “[a] litany of alleged false statements, unaccompanied by the pleading of specific facts indicating why those statements were false[.]” *Corinthian Colls.*, 540 F.3d at 1070. This Court dismissed a complaint for similar reasons in *Union Asset Mgmt. Holding AG v. SanDisk Corp.*, finding that it was “little more than a long list of block quotes from statements made by SanDisk representatives (parts of which have been bolded and italicized for reasons that the complaint does not really explain)[.]” 2016 U.S. Dist. LEXIS 15090, at *12-13 (N.D. Cal. Jan. 22, 2016) (Chhabria, J.). As in *SanDisk*, Plaintiff’s copy and paste job “doesn’t meet the demanding pleading standards of the PSLRA.” *Id.* at *13.

In addition, as discussed below, ACMR accurately disclosed its (i) revenues and profits; (ii) profit margins; (iii) equipment payments; and (iv) cash flow.

Revenues and Profits. Plaintiff states—with no support—that ACMR “materially overstated its revenues and profits” and that its “revenue and profits had been diverted to undisclosed related parties.” *E.g.*, ¶¶ 43, 48, 50. This allegation fails.

First, the Amended Complaint cannot maintain an accounting claim because it does not even allege “such basic details as the approximate amount by which revenues and earnings were overstated” or “the dates of any of the transactions” with supposed undisclosed related parties. *In re Daou Sys. Inc., Sec. Litig.*, 411 F.3d 1006, 1016 (9th Cir. 2005). Plaintiff claims that the supposed revenue and profits overstatements were “material” without providing any facts comparing the purported overstatements with ACMR’s reported revenue and profits. There is no factual basis for Plaintiff’s assertion that ACMR’s revenues or profits were overstated: ACMR has *not* restated its revenues or profits. *See Deason v. Super Micro Comput., Inc.*, 2017 U.S. Dist. LEXIS 162978, at *5 (N.D. Cal. Sep. 29, 2017) (Davila, J.) (dismissing complaint that “d[id] not allege that Super Micro was required to issue a restatement”); *Turner v. magicJack VocalTec, Ltd.*, 2014 U.S. Dist. LEXIS 13293, at *25 (S.D.N.Y. Jan. 29, 2014) (dismissing complaint where “there has been no restatement”).

Second, the Amended Complaint mistakenly hypothesizes that “ACM’s diverted and/or disappeared revenue was highlighted in the J Capital report demonstrating the gap between the

Company’s STAR IPO account and U.S. GAAP account[.]” ¶ 123. Plaintiff misrepresents his source material. That section of the J Capital report—including the table copied and pasted in the Amended Complaint—concerns *cash balances*, not *revenue*. Ex. C at 9. It is unsurprising that ACMR, the parent company, would have more cash on its balance sheet than one of its several subsidiaries. In addition, Plaintiff fails to “allege at least some facts to support that . . . any variation is not attributable to variations in reporting rules or accounting standards.” *In re China Valves Tech. Sec. Litig.*, 2012 U.S. Dist. LEXIS 130284, at *19 (S.D.N.Y. Sep. 12, 2012) (dismissing complaint based on differences between U.S. and Chinese filings; plaintiff did “not allege what accounting standards, if any, are required for [Chinese] filings, [and] the similarities or differences between those standards and U.S. GAAP”). As ACMR itself had informed investors, information disclosed by its Chinese subsidiary would differ “due to the distinct, and potentially inconsistent, accounting standards applicable to the two companies and disclosure requirements imposed by securities regulatory authorities.” Ex. H at 6.

Finally, Plaintiff’s claim that ACMR’s revenues and profits were overstated because it secretly used third-party sales agents (¶ 120) is at odds with the Company’s lengthy disclosures about agents in its sales process. Ex. H at Ex. 99.01 at 97, 244 (“The company mainly develops the market through agents”; “the company signs a product sales agency agreement with the agent, and the agent is responsible for the marketing of related products in a specific region”; “[t]he company . . . pays the agent commission according to the type of the products it sells as an agent and the commission rate agreed in advance”). Plaintiff cannot claim that information was omitted when the Company itself had already publicly disclosed it. *See Tadros v. Celladon Corp.*, 738 F. App’x 448, 448 (9th Cir. 2018) (affirming dismissal where allegedly omitted facts had been publicly disclosed); *McGovney v. Aerohive Networks, Inc.*, 367 F. Supp. 3d 1038, 1056 (N.D. Cal. 2019) (Koh, J.) (dismissing complaint; “Aerohive discloses exactly what Plaintiffs claim Aerohive omitted”).

Profit Margins. Plaintiff’s theory that “the Company inflated its gross profit margin by burying production costs in the R&D budget” (e.g., ¶¶ 48, 50, 52) fares no better. Plaintiff cannot claim that that information was omitted because ACMR repeatedly disclosed its R&D costs. Ex. I at 5; Ex. J at 5. He just recycles J Capital’s *opinion* that if R&D costs “were added to COGS [Cost of

1 Goods Sold] for Q3 2020, *as we believe they should be*, gross margin would drop by 20 points.” ¶
 2 142 (emphasis added). Plaintiff does not provide facts showing that any production costs—much less
 3 what amounts—were misclassified as R&D. The Court should not credit his baseless supposition.
 4 *See AmTrust Fin. Servs.*, 135 F. Supp. 3d at 171 (dismissing complaint that “fail[ed] to include factual
 5 support for its *ipse dixit* that loss and loss adjustment expenses were misclassified”) (emphasis in
 6 original).

7 **Equipment Payments.** Plaintiff is wrong that Defendants failed to disclose that “12.5% of
 8 equipment delivered since 2009 and 45% of total inventory has not been paid for.” *E.g.*, ¶¶ 48, 50,
 9 52. ACMR publicly disclosed this very information. *See* Ex. J at 26 (ACMR has delivered “more
 10 than 120 single-wafer wet cleaning and other front-end processing tools, more than 105 of which
 11 have been accepted by customers”); Ex. H at Ex. 99.01 at 260 (as of December 31, 2019, 44.79% of
 12 products “have been produced and delivered but not yet accepted”). Despite the fact that J Capital
 13 cited ACMR’s 3Q20 10-Q for this information (Ex. G at 8), Plaintiff misleadingly omitted the
 14 citation when he copied and pasted the text into the Amended Complaint. ¶ 142. Plaintiff cannot
 15 allege this information was omitted when it had been publicly disclosed. *See Celladon*, 738 F. App’x
 16 at 448; *Aerohive*, 367 F. Supp. 3d at 1056.

17 In addition, none of the challenged statements has anything to do with equipment deliveries or
 18 the amount of inventory that was paid for. *See Veal v. LendingClub Corp.*, 423 F. Supp. 3d 785, 808
 19 (N.D. Cal. 2019) (Freeman, J.) (no falsity for challenged statements “entirely unrelated to the loan
 20 practices Plaintiffs complain of”); *Jui-Yang Hong v. Extreme Networks, Inc.*, 2017 U.S. Dist. LEXIS
 21 64297, at *48 (N.D. Cal. Apr. 27, 2017) (Freeman, J.) (dismissing complaint; “the reasons Plaintiffs
 22 offer as to why the statements are false or misleading bear no connection to the substance of the
 23 statements themselves”). Unpaid equipment deliveries did not impact ACMR’s revenues because the
 24 Company only recognized revenue on equipment *after* customers accepted it. *See* Ex. J at 26 (only
 25 deliveries “accepted by customers . . . generated revenue to us”).

26 **Cash Flow.** Plaintiff challenges various statements about ACMR’s cash flow because it was
 27 supposedly “cash-strapped, as evidenced by its reliance on multiple credit lines[.]” ¶ 64; *see also* ¶
 28 75. But Plaintiff does not allege that the amounts of cash ACMR disclosed were incorrect, and the

1 existence of lines of credit does not somehow make cash balances false. *See LendingClub*, 423 F.
 2 Supp. 3d at 808; *Extreme Networks*, 2017 U.S. Dist. LEXIS 64297, at *48. In addition, the “15
 3 different lines of credit” that Plaintiff claims were first disclosed by J Capital in November 2020 (§
 4 137) had already been disclosed by ACMR. *See* Ex. J at 14; *see also Celladon*, 738 F. App’x at
 5 448-49; *Aerohive*, 367 F. Supp. 3d at 1056.⁴

6 **III. PLAINTIFF FAILS TO ALLEGE LOSS CAUSATION**

7 Yet an additional alternative basis for dismissal is that the Amended Complaint fails to allege
 8 loss causation with the requisite particularity. *See Uber*, 2021 U.S. App. LEXIS 14892, at *11 (“Rule
 9 9(b) applies to all elements of a securities fraud action, including loss causation.”). In *Uber*, the
 10 Ninth Circuit affirmed dismissal of a securities class action that alleged a general drop following a
 11 number of purported misstatements because the complaint “did not adequately and with particularity
 12 allege that these revelations *caused* the resulting drop.” *Id.* at *19 (emphasis in original). Similarly,
 13 the Amended Complaint “lack[s] specific facts indicating that the decline in the defendant’s stock
 14 price was proximately caused by a revelation of fraudulent activity rather than by changing market
 15 conditions, changing investor expectations, or other unrelated factors.” *Cunningham v. Identiv, Inc.*,
 16 716 F. App’x 663, 664 (9th Cir. 2018) (affirming dismissal).

17 Plaintiff tries to plead loss causation simply by pointing to two small stock drops: 1.52% on
 18 October 8, 2020, and 4.93% on November 17, 2020. *See* §§ 126, 143. To show that the stock drops
 19 were due to something other than market fluctuations, a plaintiff cannot “simply allege a defendant’s
 20 stock price declined; the decline in stock price must be ‘statistically significant.’” *Eng v. Edison Int’l*,
 21 2018 U.S. Dist. LEXIS 43629, at *6-7 (S.D. Cal. Mar. 16, 2018) (dismissing complaint). In *Edison*,
 22 Judge Benitez explained that “to plausibly allege loss causation, Plaintiff must allege facts from

23 ⁴ Plaintiff’s other theories are similarly flawed. Although he claims that Defendants failed to disclose
 24 that ACMR’s “internal controls and procedures were not effective” (e.g., §§ 52, 62, 73), he does not
 25 plead any facts questioning the effectiveness of ACMR’s internal controls. *See Rok v. Identiv, Inc.*,
 26 2017 U.S. Dist. LEXIS 1019, at *18 (N.D. Cal. Jan. 4, 2017) (Breyer, J.) (no liability for statements
 27 about internal controls where complaint made unfounded “assumption” that weaknesses existed).
 28 Plaintiff’s claim that Defendants omitted that ACMR would have limited access to its Chinese
 subsidiary’s funds (§ 112) conveniently ignores ACMR’s earlier disclosure that “[u]nder existing
 [Chinese] laws and regulations, it may be difficult, if not impossible, for [ACMR] to be able to
 receive dividends comprised of funds generated by ACM Shanghai[.]” Ex. K at 16.

1 which the Court may draw an inference that Defendants’ allegedly fraudulent conduct was a
 2 *substantial* cause of his loss[.]” *Id.* at *8 (emphasis in original). He dismissed a complaint that
 3 alleged four stock drops of collectively 6.9% for failure to plead loss causation because the “stock
 4 price drops were well within [the company’s] average trading range.” *Id.* at *9-10; *accord Camp v.*
 5 *Qualcomm Inc.*, 2020 U.S. Dist. LEXIS 42079, at *19 (S.D. Cal. Mar. 10, 2020) (dismissing
 6 complaint for failure to plead loss causation because 4.02% drop was “minimal,” whereas “securities
 7 complaints tend to be predicated on double digit declines”).

8 Plaintiff does not claim that either stock dip was statistically significant. On the contrary, like
 9 the stock drops in *Edison*, the two declines alleged in the Amended Complaint were well within
 10 ACMR’s regular trading range. ACMR’s 1.52% drop on October 8, 2020 was flanked by much
 11 greater fluctuations: a 7.51% decline on October 6 and a 6.58% increase on October 9. Ex. B at 3.
 12 The 1.52% drop was actually the *smallest* fluctuation in ACMR’s stock that week. *Id.* The same is
 13 true of the second stock drop. On November 17, 2020, ACMR was in the fourth day of a five-day
 14 slide (*id.*), prior to any purported revelation of fraud. ACMR’s stock had been highly volatile in
 15 November: the week before November 17, it dropped and then rose by over 8% on consecutive days,
 16 and in the week after November 17, it rose again by over 8% in a single day. *Id.*⁵

17 The Court should follow the Ninth Circuit in rejecting Plaintiff’s unsupported loss causation
 18 theory. *See Corinthian Colls.*, 540 F.3d at 1064-65 (rejecting unsupported loss causation theory in
 19 favor of “more plausible” explanation).

24 ⁵ Plaintiff also cannot establish loss causation for the November 17, 2020 stock drop because he sold
 25 his options contracts for ACMR stock two weeks earlier. ECF 23-3 at 2; *see also Dean v. China*
 26 *Agritech, Inc.*, 2011 U.S. Dist. LEXIS 124264, at *15 (C.D. Cal. Oct. 27, 2011) (no loss causation
 27 where “[c]ertification clearly shows that Yong sold his stock prior to the release of the LM Report”).
 28 Plaintiff’s original complaint only alleged a stock drop in October 2020 (ECF 1), and he added the
 November 2020 stock drop in the Amended Complaint. This Court previously admonished the other
 prospective lead plaintiff candidate for attempting to claim a loss on a sale before the stock drop.
 ECF 43 at 4-6.

CONCLUSION

For the foregoing reasons, Defendants’ motion to dismiss should be granted.⁶ Plaintiff has already used up his amendment as of right under Rule 15. He asked for, and received, additional time in which to develop the amended complaint. The case has already been pending over 6 months—ample time in which to draft a complaint that does more than quote short-seller reports. This may be the rare case in which dismissal should be with prejudice.

Dated: May 27, 2021

Respectfully submitted,

FRESHFIELDS BRUCKHAUS DERINGER US LLP

By: /s/ Boris Feldman
Boris Feldman

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⁶ Because Plaintiff’s 10(b) claim fails, so does his 20(a) claim. *See, e.g., In re Align Tech., Inc. Sec. Litig.*, 2021 U.S. Dist. LEXIS 59783, at *24 (N.D. Cal. Mar. 29, 2021) (Chesney, J.) (“plaintiff has failed to state a claim under § 10(b) or Rule 10b-5, and, consequently, such failure precludes plaintiff from stating a claim under § 20(a)”).